

**LINDEMANN LAW FIRM, APC**  
BLAKE J. LINDEMANN, SBN 255747  
DONNA R. DISHBAK, SBN 259311  
433 N. Camden Drive, 4th Floor  
Beverly Hills, CA 90210  
Telephone: (310) 279-5269  
Facsimile: (310) 300-0267  
E-Mail: blake@lawlbl.com

*Attorneys for Plaintiff and the Proposed Classes*

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA**

ARNOLD NAVARRO, on behalf of himself  
and all others similarly situated.

Case No. 3:22-cv-00095-WHO

Judge: Hon. William H. Orrick

**Plaintiff,**

V.

SMILEDIRECTCLUB, INC.;  
SMILEDIRECTCLUB, LLC, and JEFFREY  
SULITZER; DOES 1-10,

### Defendants.

**PLAINTIFF'S OPPOSITION TO  
DEFENDANTS' MOTION TO COMPEL  
ARBITRATION**

[Declarations of Arnold Navarro and Blake J. Lindemann In Support of Opposition Thereto]

Date: March 30, 2022  
Time: 2:00 p.m.  
Courtroom: 2, 17<sup>th</sup> Floor  
Judge: Hon. William H. Orrick

Date Removed: January 6, 2022

## TABLE OF CONTENTS

1	I.	INTRODUCTION .....	1
2	II.	RELEVANT FACTUAL ALLEGATIONS .....	2
3	A.	Defendants' Medical Services Caused Injury to Plaintiff Navarro and putative Class Members .....	2
4	B.	The Oppressive Terms in the Form are Not Conspicuous and Do Not Give Reasonable Notice to the Ordinary User .....	2
5	III.	STATEMENT OF ISSUES TO BE DECIDED .....	3
6	IV.	THE DEFENDANTS HAVE NOT MET THEIR BURDEN TO COMPEL ARBITRATION .....	3
7	V.	THE DISPUTE IN THIS MOTION CANNOT BE DELEGATED TO AN ARBITRATOR .....	3
8	A.	The Arbitration Form Lacks any Delegation or Jurisdictional Provision .....	4
9	B.	Even if the Form Contained a Delegation Provision, Delegation Is Inoperative as to Plaintiff's Contention that the Form Was Not Formed Pursuant to CCP § 1295 .....	6
10	VI.	THE PURPORTED ARBITRATION FORM FAILS FOR LACK OF ASSENT .....	7
11	VII.	THE PURPORTED ARBITRATION FORM FAILS FOR LACK OF COMPLIANCE WITH CCP § 1295 .....	8
12	A.	Defendants Do Not Dispute that the Arbitration Form does not comply with CCP § 1295 .....	9
13	B.	The FAA Does Not Preempt CCP § 1295 .....	10
14	C.	<i>CCP § 1295 Applies to Defendants</i> .....	12
15	D.	CCP § 1295 is not a safe harbor provision .....	13
16	VIII.	THE PURPORTED ARBITRATION FORM FAILS UNDER THE <i>MCGILL</i> RULE .....	14
17	IX.	THE FORM IS UNCONSCIONABLE .....	16
18	A.	The Form is Procedurally Unconscionable .....	16
19	B.	The Form is Substantively Unconscionable .....	17
20	1.	Requiring one party to arbitrate, but not the other is unconscionable .....	17
21	2.	The Form Does Not Even Suggest any Agreement until Page 8 .....	17
22	3.	The Expense of Arbitration Dwarfs Plaintiff's Individual Claims .....	17

1	C. The Unconscionable Terms Should Not Be Severed .....	18
2	X. EVIDENTIARY OBJECTIONS .....	19
3	XI. CONCLUSION .....	20
4		
5		
6		
7		
8		
9		
10		
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		
26		
27		
28		

TABLE OF AUTHORITIES

## 1 Cases

2	<i>Ali v. J.P. Morgan Chase Bank, N.A.,</i> No. 14-15076, 2016 WL 1380922, at *1 (9 <sup>th</sup> Cir. Apr. 7, 2016) .....	16
4	<i>Am Express Co. v. Italian Colors Rest.,</i> 470 U.S. 228, 236 (2013) .....	15
6	<i>Am. Triticale, Inc. v. Nytco Servs., Inc.,</i> 664 F.2d 1136, 1143 (9th Cir. 1981) .....	9
7	<i>Armendariz v. Foundation Health Psychcare Services, Inc.</i> (Cal. 2000), 6 P.3d 669, 693 .....	17
9	<i>Attia v. Neiman Marcus Group,</i> Case No. 8:16-cv-00504 (C.D. Cal. June 27, 2016) .....	16
11	<i>Aviles v. Quick Pick Express, LLC,</i> Case No. CV-15-5214-MWF, 2015 WL 9810998, at *7 (C.D. Cal. Dec. 3, 2015) .....	16
12	<i>Barraza v. Cricket Wireless LLC,</i> No. C 15-02471 WHA, 2015 WL 6689396, at *6 (N.D. Cal. Nov. 3, 2015) .....	20
14	<i>Blair v. Rent-A-Ctr., Inc.,</i> 928 F.3d 819 (9th Cir. 2019) .....	14
16	<i>Blair v. Scott Specialty Gases,</i> 283 F.3d 595, 609 (3d Cir. 2002) .....	19
17	<i>Block v. City of Los Angeles,</i> 253 F.3d 410, 418-19 (9th Cir. 2001) .....	3
19	<i>Brennan v. Opus Bank,</i> 796 F.3d 1125, 1132 (9 <sup>th</sup> Cir. 2015) .....	5
21	<i>Bridges Fund v. Fastbucks Franchise Corp.,</i> 622 F.3d 996, 1004 (9 <sup>th</sup> Cir. 2010) .....	16, 18
22	<i>Brown v. Kaiser Found. Health Plan, Inc.,</i> No. E069356, 2019 WL 2539179, at *4 (Cal. Ct. App. June 20, 2019) .....	10
24	<i>Burks v. Kaiser Found. Health Plan, Inc.,</i> 160 Cal. App. 4th 1021 (Cal. App. 3d Dist. 2008) .....	9
26	<i>Campos v. Campos Family Farms, LLC,</i> No. 12-598-LJO, 2012 WL 2090303, at *8 (E.D. Cal. June 8, 2012) .....	6
27	<i>Cf. Hunter v. Kaiser Foundation Health Plan,</i> 434 F. Supp. 3d 764, 772 (N.D. Cal. 2020) .....	10

1	<i>CLMS Mgmt. Servs. Ltd. P'ship v. Amwins Brokerage of Georgia, LLC,</i> 8 F.4th 1007 (9th Cir. 2021).....	11
2	<i>Comb v. PayPal,</i> 218 F. Supp. 2d 1165 (N.D. Ca. 2002) .....	17
3		
4	<i>Comer v. Micor, Inc.,</i> 436 F.3d 1098, 1104 n.11 (9th Cir. 2006) .....	6
5		
6	<i>Compare Eiess v. USAA Fed. Sav. Bank,</i> 404 F. Supp. 3d 1240, 1253 (N.D. Cal. 2019).....	6
7		
8	<i>Concat LP v. Unilever, PLC,</i> 350 F.Supp.2d 796, 804 (N.D. Cal. 2004).....	3
9		
10	<i>Cordas v. Uber Techs. Inc.,</i> 228 F. Supp. 3d 985, 992, fn. 1 (N.D. Cal. 2017) .....	4
11		
12	<i>Covenant Care, Inc. v. Super. Ct.</i> (2004) 32 Cal.4th 771, 785 .....	13
13		
14	<i>Dinong v. Superior Court,</i> 102 Cal. App. 3d 845, 849 (Cal. Ct. App. 1980) .....	14
15		
16	<i>Dugan v. R.J. Corman R.R. Co.,</i> 344 F.3d 662, 669 (7 <sup>th</sup> Cir. 2003) .....	19
17		
18	<i>Fardig v. Hobby Lobby Stores, Inc.,</i> 2014 U.S. Dist. LEXIS 87284, at *10 (C.D. Cal. June 13, 2014) .....	16
19		
20	<i>Ferguson v. Corinthian Colleges, Inc.,</i> 733 F.3d 928, 930 (9 <sup>th</sup> Cir. 2013) .....	14
21		
22	<i>Ferguson v. Countrywide Credit Industries, Inc.,</i> 298 F.3d 778, 788 (9th Cir. 2002) .....	18
23		
24	<i>First Options of Chicago, Inc. v. Kaplan,</i> 514 U.S. 938, 944 (1995) .....	5, 6
25		
26	<i>Flores v. Presbyterian Intercommunity Hospital</i> (2016) 63 Cal.4th 75 .....	13
27		
28	<i>Fraser v. Goodale,</i> 342 F.3d 1032, 1036-37 (9th Cir. 2003).....	3
	<i>Friedman v. Guthy-Renker LLC,</i> Case No. 2:14-cv-06009-ODW, 2015 WL 857800, at *3 (C.D. Cal. Feb. 27, 2015) .....	7
	<i>Front. Oil Corp. v. RLI Ins. Co.,</i> 2007 Cal. App. LEXIS 1298 (2d Dist. August 6, 2007).....	16

1	<i>GIB, LLC v. Salon Ware, Inc.</i> , 634 F. App'x 610, 611 (9th Cir. 2016) .....	20
2	<i>Granite Rock Co. v. Int'l Bd. of Teamsters</i> , 130 S. Ct. 2847, 2859–60 (2010).....	4, 6
3		
4	<i>Great Nor. Ry. Co. v. Sup. Ct.</i> (1970) 12 Cal.App.3d 105, 113 .....	16
5		
6	<i>Gutierrez de Martinez v. Lamagno</i> , 515 U.S. 417, 434 n.9 (1995) .....	10
7		
8	<i>Henderson v. Super. Ct.</i> , 142 Cal. Rptr. 478 (Cal. Ct. App. 1978).....	16
9		
10	<i>Humana Inc. v. Forsyth</i> , 525 U.S. 299, 307, 119 S.Ct. 710, 142 L.Ed.2d 753 (1999).....	11
11		
12	<i>Hunt Wesson Foods, Inc. v. Supreme Oil Co.</i> , 817 F.2d 75, 77-78 (9 <sup>th</sup> Cir. 1987) .....	10
13		
14	<i>Hunter and Brown, of Scott v. Yoho</i> , 248 Cal. App. 4 <sup>th</sup> 392, 407 (Cal. Ct. App. 2016) .....	10
15		
16	<i>Imbler v. PacifiCare of Cal., Inc.</i> (2002) 103 Cal.App.4th 567, 571-573 ( <i>Imbler</i> ) .....	11
17		
18	<i>Ingle v. Circuit City Stores</i> , 328 F.3d 1165, 1180 (9th Cir. 2003) .....	18
19		
20	<i>Interstate Circuit, Inc. v. United States</i> 306 U.S. 208, 226 (1939) .....	19
21		
22	<i>Ionescu v. Extra Space Storage Inc.</i> , 19-CV-02226-YGR, 2019 WL 3997480, at *4 (N.D. Cal. Aug. 23, 2019) .....	15
23		
24	<i>J.B.B Investments Partners, LTD v. Fair</i> , 232 Cal. App. 4 <sup>th</sup> 974 (2014) .....	7
25		
26	<i>Jurado v. Schutz 655, LLC</i> , 2017 WL 600076, *5 (C.D. Cal. Feb. 13, 2017) .....	3
27		
28	<i>Kindred Nursing Limited Partnership v. Clark</i> , 137 S. Ct. 1421, 1423 (2017).....	12
26	<i>Little v. Auto Stiegler, Inc.</i> , 63 P.3d 979, 984 (Cal. 2003).....	17
27		
28	<i>Los Angeles News Service v. CBS Broadcasting, Inc.</i> , 305 F.3d 924, 935-36 (9 <sup>th</sup> Cir. 2002) .....	19

1	<i>Lucas v. Hertz Corp.</i> , 875 F.Supp.2d 991, 998 (N.D. Cal. 2012).....	7
2		
3	<i>Malek v. Blue Cross of California</i> , 121 Cal. App. 4 <sup>th</sup> 44, 71-72 (Cal. Ct. App. 4 <sup>th</sup> Dist. 2004) .....	9
4		
5	<i>McCarthy v. Providential Corp.</i> , No. C 94-0627, 1994 WL 387852, at *2 (N.D. Cal. July 19, 1994).....	3
6		
7	<i>McGhee v. North American Bancard</i> , 2017 WL 3118799 (S.D. Cal. 2017).....	7
8		
9	<i>McGill v. Citibank, N.A.</i> , 2 Cal. 5th 945 (Cal. 2017) .....	1, 14
10		
11	<i>McKee v. Audible, Inc.</i> , No. CV 17-1941-GW(EX), 2017 WL 4685039, at *8 (C.D. Cal. July 17, 2017) .....	7
12		
13	<i>McLellan v. Fitbit, Inc.</i> , No. 3:16-cv-00036-JD, 2017 WL 4551484, at *2 (N.D. Cal. Oct. 11, 2017) .....	6
14		
15	<i>Nagrampa v. MailCoups, Inc.</i> , 469 F.3d 1257, 1293 (9th Cir. 2006) .....	18
16		
17	<i>Ojo v. Farmers Grp., Inc.</i> , 600 F.3d 1205, 1208–09 (9th Cir. 2010) .....	11
18		
19	<i>Perez v. DIRECTV Group Holdings, L.L.C.</i> , No. 8:16-cv-1440-JLS-DFMx, 2017 WL 1836357 (C.D. May 1, 2017) .....	18
20		
21	<i>Pokorny v. Quixtar, Inc.</i> , 601 F.3d 1987, 1004 (9th Cir. 2010) .....	16
22		
23	<i>Poublon v. C.H. Robinson Co.</i> , 846 F.3d 1251, 1272 (9th Cir. 2017) .....	18
24		
25	<i>Railroad Management Co., L.L.C. v. CFS Louisiana Midstream Co.</i> , 428 F.3d 214, 219, fn. 2 (5 <sup>th</sup> Cir. 2005) .....	19
26		
27	<i>Rent-A-Center, West, Inc. v. Jackson</i> , 130 S. Ct. 2772, 177 L.Ed.2d 403 (2010).....	4
28		
25	<i>Rodriguez v. Superior Court</i> , 176 Cal. App. 4 <sup>th</sup> 1461, 1470 (2009) .....	10, 14
26		
27	<i>Rosenfield v. Superior Court</i> (1983) 143 Cal. App.3d 198, 200 .....	9, 13
28		
	<i>Rui Chen v. Premier Financial Alliance, Inc.</i> , No. 18-CV-3771 (YGR), 2019 WL 280944, at *1 n. 3 (N.D. Cal. Jan. 22, 2019).....	8

1	<i>Sanford v. MemberWorks, Inc.</i> , 483 F.3d 956, 962 (9th Cir. 2007) .....	5, 20
2		
3	<i>Scudder v. Union Nat. Bank of Chicago</i> , 91 U.S. 406, (1875) .....	16
4		
5	<i>Smith v. PacifiCare Behavioral Health of Cal., Inc.</i> (2001) 93 Cal.App.4th 139, 152-162.....	12
6		
7	<i>Tompkins v. 23andMe, Inc.</i> , No. 5:13-CV-05682-LHK, 2014 WL 2903753, at *17 (N.D. Cal. June 25, 2014) .....	5
8		
9	<i>United States Dep’t of Treasury v. Fabe</i> , 508 U.S. 491, 507-08 (1993) .....	11
10		
11	<i>Wheeler v. St. Joseph Hospital</i> (1976) 63 Cal. App.3d 345, 361, fn. 11 .....	9
12		
13	<b>Statutes</b>	
14	15 U.S.C. § 1011 .....	10, 11
15		
16	15 U.S.C. § 1012(b).....	11
17		
18	15 U.S.C. § 7006(5).....	7
19		
20	28 U.S.C. § 1914 .....	17
21		
22	9 U.S.C. § 4 .....	20
23		
24	Cal. Civ. Code § 1670.5(a) .....	18
25		
26	<i>CCP § 1295 (b)</i> .....	1
27		
28	<i>CCP § 1295(a)</i> .....	1
29		
30	<i>CCP § 1295(b)</i> .....	6
31		
32	<i>CCP § 1295(c)</i> .....	7
33		
34	<i>CCP § 1363.1</i> .....	10
35		
36	Civil Code § 1633.1 <i>et seq</i> .....	7
37		
38	<b>Other Authorities</b>	
39		
40	Antonin Scalia & Bryan Garner, <i>Reading Law: The Interpretation of Legal Texts</i> 114 (2012) .....	10
41		
42	Electronic Signatures in Global and National Commerce Act (“ESIGN”) codified at 15 U.S.C. § 7001, <i>et seq</i> .....	7
43		
44	Stats. 1975, Second Ex. Sess. 1975-1976, ch. 1, § 26.6, pp. 3975-3976.....	9

1	Uniform Electronic Transactions Act (“UETA”) .....	7
2	<b>Rules</b>	
3	Civil L.R. 7-3(a) .....	19
4	Fed. R. Civ. P. 56(c)(2) .....	3
5	Federal Rule of Evidence 1002 .....	8
6	Federal Rules of Civil Procedure 56.....	3
7		
8		
9		
10		
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		
26		
27		
28		

1 I. **INTRODUCTION**

2 Defendants' request to arbitrate the claims at issue in this case, fails for four reasons. *First*,  
 3 Defendants have failed to meet their burden that Mr. Navarro assented to an electronic arbitration  
 4 agreement in accordance with *Nguyen v. Barnes & Noble, Inc.*, 76 F.3d 1171, 1173 (9<sup>th</sup> Cir. 2014).  
 5 Defendants did not present the design of the enrolling website from which Plaintiff and other patients  
 6 enrolled, but instead vaguely refer to a cropped image of a click box in the declaration attached to the  
 7 Motion. This is insufficient evidence to establish constructive assent for a clickwrap arbitration  
 8 agreement in accordance with *Nguyen*.

9 *Second*, the form submitted to this Court by the Defendants as the arbitration agreement  
 10 (Dkt. 20-1) "Form" failed to include requisite disclosures, a signature, and other notices as required  
 11 by CCP § 1295(a) and (b). Authority is clear that these requirements are not preempted by the Federal  
 12 Arbitration Act. Defendants' contention that they should not be considered "health care providers" is  
 13 contradicted by their own documents that refer to Plaintiff as a "patient" and the case law interpreting  
 14 the definition. These issues are not delegated to the arbitrator because there is no delegation clause in  
 15 the Form, and delegation would not apply to these issues reserved for the Court as a matter of law.  
 16 Defendants' failure to comply with CCP § 1295(a) and (b) renders their claim for arbitration to be  
 17 wholly unenforceable.

18 *Third*, the Form only permits Plaintiff to pursue "damages" and by implication, Plaintiff  
 19 may seek no other remedies. Thus, the Form is in violation of the rule in *McGill v. Citibank, N.A.*  
 20 (2017) 2 Cal. 5th 945. Moreover, Defendants have not demonstrated that public injunctive is available  
 21 in arbitration based on the rules of AAA or any judicial decision confirming any such award.

22 *Finally*, the Form is both procedurally and substantively unconscionable because the Form  
 23 is not labeled an agreement, it does not suggest the wording of an agreement of any kind until page  
 24 nine, there are other "terms and conditions" the parties entered into that do not reference a patient's  
 25 requirement to arbitrate, the arbitration remedy is non-mutual because Defendants may pursue their  
 26 claims outside of arbitration, and other reasons as more fully set forth below. The Motion should be  
 27 denied.

1       II. **RELEVANT FACTUAL ALLEGATIONS**

2           **A. Defendants' Medical Services Caused Injury to Plaintiff Navarro and putative**  
 3           **Class Members.**

4       Defendants are engaged in an enterprise that constitutes the unauthorized practice of  
 5       dentistry. Original Class Action Complaint ("Compl."), ¶ 1. The Defendants failed to conduct an  
 6       initial exam of Plaintiff and class members' mouths, gums, roots before a diagnosis and treatment plan  
 7       is discussed with the patient, and prior to fitting patients for aligners. The imprecision and danger to  
 8       patients is apparently what has caused Invisalign to discontinue the use of a mold fitting process, and  
 9       instead caused Invisalign to use laser scans authorized by licensed medical professionals. There is an  
 10      accusation against the Chief Clinical Officer of the corporate defendants, Jeffrey Sulitzer, that he and  
 11      Defendants have been engaged in the unauthorized practice of dentistry. Lindemann Decl., **Ex. 1, Ex.**  
 12      **2, Ex. 3.**

13       Mr. Navarro was harmed by Defendants' conduct, which included without limitation,  
 14       making false representations about the quality of services to be performed, and misleading and  
 15       violating consumer protection laws of California. Mr. Navarro has sustained issues with his bite, the  
 16       placement of his teeth, and has sustained significant pain and injury based on Defendants' services.  
 17       Mr. Navarro has reviewed the declaration in support of the Motion to compel arbitration and the  
 18       exhibits. Notably, he has a different "terms and conditions" in his records that does not make any  
 19       reference to arbitration. Declaration of Arnold Navarro ("Navarro Decl."), ¶ 6, **Ex. 4.**

20           **B. The Oppressive Terms in the Form are Not Conspicuous and Do Not Give**  
 21           **Reasonable Notice to the Ordinary User.**

22       There is no suggestion of any "agreement" or "contract" in the Form, until page 9. Dkt.  
 23       No. 20-1. This is insufficient to create an agreement to arbitrate and is contrary to how nearly every  
 24       legitimate company presents an arbitration contract. In fact, the Form is labeled as an informational  
 25       and in fact provides information in page 1 through 8. The word "agreement" does not appear until  
 26       page 9. This is insufficient to suggest any agreement to arbitrate, and is at minimum, misleading.

27       Moreover, Defendants have failed to produce the design of the alleged website in place to  
 28       permit assent through a clickwrap agreement in accordance with Ninth Circuit Law. Finally, the Form

1 lacks the mandatory disclosures and requirements that all medical service providers must include to  
 2 enter into an arbitration agreement.

3 **III. STATEMENT OF ISSUES TO BE DECIDED**

4     1. Was the purported Form assented to based on the design of the enrolling website pursuant  
       5 to *Nguyen v. Barnes & Noble, Inc.*, 76 F.3d 1171, 1173 (9<sup>th</sup> Cir. 2014).

6     2. Does CCP § 1295 require the Motion to be denied.

7     3. Does the purported Form contain a delegation provision.

8     4. Even if the claims were within the scope of any delegation provision, is delegation  
       9 inoperative based on the contentions and lack of any formation pursuant to CCP § 1295.

10    5. Does the *McGill* Rule require the Motion to be denied.

11    6. Is the purported Form, or the delegation provision, unconscionable.

12 **IV. THE DEFENDANTS HAVE NOT MET THEIR BURDEN TO COMPEL**  
 13 **ARBITRATION**

14   On a Motion to Compel Arbitration, the Court applies a standard similar to the summary  
 15 judgment standard applied under Rule 56 of the Federal Rules of Civil Procedure. *Concat LP v.*  
 16 *Unilever, PLC*, 350 F. Supp. 2d 796, 804 (N.D. Cal. 2004) (*citing McCarthy v. Providential Corp.*,  
 17 No. C 94-0627, 1994 WL 387852, at \*2 (N.D. Cal. July 19, 1994); *Jurado v. Schutz 655, LLC*, 2017  
 18 WL 600076, \*5 (C.D. Cal. Feb. 13, 2017)). Under Rule 56, “[a] party may object that the material  
 19 cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence.”  
 20 Fed. R. Civ. P. 56(c)(2). “[T]o survive summary judgment, a party does not necessarily have to  
 21 produce evidence in a form that would be admissible at trial, as long as the party satisfies the  
 22 requirements of Federal Rules of Civil Procedure 56.” *Fraser v. Goodale*, 342 F.3d 1032, 1036-37  
 23 (9th Cir. 2003) (*quoting Block v. City of Los Angeles*, 253 F.3d 410, 418-19 (9th Cir. 2001)) (internal  
 24 quotation marks omitted).

25 **V. THE DISPUTE IN THIS MOTION CANNOT BE DELEGATED TO AN**  
 26 **ARBITRATOR**

27   As set forth herein, the District Court must hear the challenges to arbitration because the Form  
 28 lacks a delegation or jurisdictional provision referring such dispute, the Form is vague about what

1 version of the rules of AAA would apply to any such arbitration, delegation is unavailable as to  
 2 whether a contract was formed in accordance with California law, and in the alternative, delegation  
 3 does not apply to this consumer dispute. As set forth more fully below, Plaintiff contends that the  
 4 delegation clause is unenforceable.

5 **A. The Arbitration Form Lacks any Delegation or Jurisdictional Provision**

6 “It is well settled in both commercial and labor cases that whether parties have agreed to  
 7 ‘submi[t] a particular dispute to arbitration’ is typically an ‘issue for judicial determination.’” *Granite*  
 8 *Rock Co. v. Int'l Bd. of Teamsters*, 130 S. Ct. 2847, 2855 (2010). Defendants first contend that  
 9 arbitrability was delegated to the arbitrator and should be decided by a later appointed arbitrator as  
 10 opposed to this Court. Mot. 11. However, Defendants have failed to meet their burden that the  
 11 arbitration Form includes a valid delegation clause, or more simply, that delegation was an issue to be  
 12 submitted for arbitration. The delegation clauses in all of Defendants’ cited authority were broad.  
 13 “The agreement provided for arbitration of all ‘past, present or future’ disputes arising out of Jackson’s  
 14 employment with Rent-A-Center, including ‘claims for discrimination’ and ‘claims for violation of  
 15 any federal … law.’ It also provided that ‘[t]he Arbitrator, and not any federal, state, or local court or  
 16 agency, shall have exclusive authority to resolve any dispute relating to the interpretation,  
 17 applicability, enforceability or formation of this agreement including, but not limited to any claim that  
 18 all or any part of this agreement is void or voidable.’” *Rent-A-Center, West, Inc. v. Jackson*, 130 S. Ct.  
 19 2772, 177 L.Ed.2d 403 (2010). Decisions from this District that Defendants cited to similarly included  
 20 a broad delegation provision. *Cordas v. Uber Techs. Inc.*, 228 F. Supp. 3d 985, 992, fn. 1 (N.D. Cal.  
 21 2017), J. Seeborg (“You agree that any dispute, claim or controversy arising out of or relating to these  
 22 Terms or the breach, termination, enforcement, interpretation or validity thereof or the use of the  
 23 Services (collectively, "Disputes") will be settled by binding arbitration between you and Uber.”).

24 Here on the other hand, there is no delegation or jurisdictional provisions in the Form. The  
 25 Form here does not apply to all claims, disputes or controversies, but only contemplates referral of  
 26 “any dispute *regarding the products and services offered* through SmileDirectClub…” Defendants’  
 27 Ex. 1, at 7-8 (emphasis added). There is no reference to an arbitrator’s authority to decide all claims  
 28 broadly, nor any suggestion that the arbitrator can decide anything other than a dispute regarding the

1 products and services. For this reason alone, the delegation provision is unenforceable under Supreme  
 2 Court and Ninth Circuit authority. *See First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944  
 3 (1995) (in a rare unanimous decision denying referral of arbitrability to the arbitrator, Justice Breyer  
 4 wrote “[a]nd, given the principle that a party can be forced to arbitrate only those issues it specifically  
 5 has agreed to submit to arbitration, one can understand why courts might hesitate to interpret silence  
 6 or ambiguity on the ‘who should decide arbitrability’ point as giving the arbitrators that power.”). The  
 7 Defendants suggest that the mere incorporation of the “AAA rules” could rectify this clear failure.  
 8 There are two problems with that argument.

9 *First*, a court may only enforce an arbitration Form regarding arbitrability “that clearly and  
 10 unmistakably delegates arbitrability questions to the arbitrator.” *Brennan v. Opus Bank*, 796 F.3d  
 11 1125, 1132 (9<sup>th</sup> Cir. 2015). A litigant can directly challenge the assertion of a “delegation provision”  
 12 directly, *Id.* at 1132, which is precisely what Plaintiff is doing here. As stated above, this Form lacks  
 13 a delegation provision that existed in *Jackson*, *Kaplan*, and *Brennan* because the Form only refers to  
 14 claims “regarding the products and services” and does not broadly delegate any and all claims to  
 15 arbitration. *See also Sanford v. MemberWorks, Inc.*, 483 F.3d 956, 962 (9th Cir. 2007) (“It is axiomatic  
 16 that “[a]rbitration is a matter of contract and a party cannot be required to submit any dispute which  
 17 he has not agreed so to submit.””). The parties did not agree to submit the dispute of arbitrability to  
 18 arbitration.

19 *Second*, and independently, the Form does not clearly and unmistakably refer to any particular  
 20 version of the Rules of AAA and reveals further ambiguities and deficiencies. Navarro Decl. ¶ 3.  
 21 Defendants’ reference to the commercial rules of AAA in their brief is improper because there is no  
 22 suggestion or reference in the Form that the “commercial” version of the AAA Rules would apply.  
 23 *Tompkins v. 23andMe, Inc.*, No. 5:13-CV-05682-LHK, 2014 WL 2903753, at \*17 (N.D. Cal. June 25,  
 24 2014) (“...in the instant case, there are at least two ambiguities in the arbitration provision’s reference  
 25 to the AAA rules: lack of identification of specific AAA rules, and uncertainty as to whether the  
 26 Consumer Rules apply in addition to the Commercial Rules”). The introduction to the Commercial  
 27 AAA Rules provides that “parties can provide for arbitration of future disputes by inserting the  
 28 following clause in their contracts: Any controversy or claim arising out of or relating to this contract,

1 or the breach thereof, shall be settled by arbitration ... by the AAA under its Commercial Arbitration  
 2 Rules.” AAA Commercial Rules, Introduction.<sup>1</sup> Of course, the Form could have easily contained  
 3 such a clause if Defendants intended no ambiguity, but they failed to do so. The failure to include a  
 4 broad delegation provision renders the demands for delegation that Defendants have made to be  
 5 ambiguous, and thus, delegation is inoperative.

6 **B. Even if the Form Contained a Delegation Provision, Delegation Is Inoperative as to**  
 7 **Plaintiff’s Contention that the Form Was Not Formed Pursuant to CCP § 1295**

8 “It is similarly well settled that where the dispute at issue concerns contract formation, the  
 9 dispute is generally for courts to decide.” *Granite Rock Co. v. Int'l Bd. of Teamsters*, 130 S. Ct. 2847,  
 10 2855-56 (2010). “[T]he federal policy favoring arbitration is inapplicable to the determination of  
 11 whether a valid agreement to arbitrate between the parties exists.” *Campos v. Campos Family Farms,*  
 12 *LLC*, No. 12-598-LJO, 2012 WL 2090303, at \*8 (E.D. Cal. June 8, 2012) (*citing Comer v. Micor, Inc.*,  
 13 436 F.3d 1098, 1104 n.11 (9th Cir. 2006)). Rather, that determination is made by reference to ordinary  
 14 state law contract principles. *See First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995)  
 15 (“[t]he relevant state law here, for example, would require the court to see whether the parties  
 16 objectively revealed an intent to submit the arbitrability issue to arbitration.”). In this Circuit, both  
 17 parties must assent to the contract under applicable state law. *Nguyen v. Barnes & Noble, Inc.*, 76  
 18 F.3d 1171, 1173 (9<sup>th</sup> Cir. 2014).

19 Here, California law has specific formation requirements that were not met, so no contract was  
 20 ever formed. Pursuant to CCP § 1295(b), a specific notice must be placed “immediately before the  
 21

---

22 <sup>1</sup> Even if a delegation clause had been included by the drafter, Smile Direct Club, this dispute brought by  
 23 Plaintiff as an unsophisticated party (Navarro Decl. ¶ 7), should not be compelled to arbitration. Contrary to  
 24 Defendants’ argument, since *Brennan*, courts have been split on this issue as to whether a delegation clause  
 25 pertaining to an unsophisticated party is enforceable. *Compare Eiess v. USAA Fed. Sav. Bank*, 404 F. Supp. 3d  
 26 1240, 1253 (N.D. Cal. 2019) (“However, the majority of the lower courts in the Ninth Circuit have ‘held that  
 27 incorporation of the AAA rules was insufficient to establish delegation in consumer contracts involving at least  
 28 one unsophisticated party.’”) *compare with McLellan v. Fitbit, Inc.*, No. 3:16-cv-00036-JD, 2017 WL 4551484,  
 at \*2 (N.D. Cal. Oct. 11, 2017) (“The ‘greater weight of authority has concluded that the holding of *Opus Bank*  
 applies similarly to nonsophisticated parties.’”). Plaintiff agrees with the decisions that have concluded  
 delegation would not be allowed under these circumstances, as an alternative to the deficiencies highlighted  
 regarding the delegation clause directly.

1 *signature line...*" (emphasis added). "Once *signed*, such a contract governs all subsequent open-  
 2 book account transactions for medical services..." CCP § 1295(c) (emphasis added). Defendants  
 3 have not established any arbitration agreement that was signed,<sup>2</sup> with a "signature line" by Plaintiff or  
 4 any of the putative class representatives. Since the state law issue goes to whether a contract was  
 5 formed under California law, it must be decided by the Court and cannot be delegated to the arbitrator  
 6 as a matter of law.

7 **VI. THE PURPORTED ARBITRATION FORM FAILS FOR LACK OF ASSENT**

8 The Defendants bear the burden of proving by a preponderance of the evidence the existence  
 9 of a valid arbitration agreement. *See Lucas v. Hertz Corp.*, 875 F.Supp.2d 991, 998 (N.D. Cal. 2012).  
 10 Because there is no evidence offered of the sign-up process suggesting adequate notice of the  
 11 agreement, law in this Circuit requires that the Motion to compel arbitration be denied. *Nguyen v.*  
 12 *Barnes & Noble, Inc.*, 76 F.3d 1171, 1173 (9<sup>th</sup> Cir. 2014); *Friedman v. Guthy-Renker LLC*, Case No.  
 13 2:14-cv-06009-ODW, 2015 WL 857800, at \*3 (C.D. Cal. Feb. 27, 2015) (denying motion to compel  
 14 arbitration based on the design of the website and the lack of any temporal and spatial reference to the  
 15 policies being agreed to by the consumer); *McGhee v. North American Bancard*, 2017 WL 3118799  
 16 (S.D. Cal. 2017); *McKee v. Audible, Inc.*, No. CV 17-1941-GW(EX), 2017 WL 4685039, at \*8 (C.D.  
 17 Cal. July 17, 2017).

18

19

---

20 <sup>2</sup> Alternatively, the requirements for an electronic signature were not satisfied. Congress enacted the Electronic  
 21 Signatures in Global and National Commerce Act ("ESIGN") codified at 15 U.S.C. § 7001, *et seq.* that governs whether  
 22 electronic signatures are enforceable. An "electronic signature" is only valid in place of a wet signature under ESIGN if  
 23 the individual provides "an electronic sound, symbol, or process, attached to or logically associated with a contract or other  
 record and *executed or adopted by a person with the intent to sign the record.*" 15 U.S.C. § 7006(5) (emphasis added).  
 California Law similarly defines a valid electronic signature pursuant to the Uniform Electronic Transactions Act  
 ("UETA"). Civil Code § 1633.1 *et seq.*

24

In evaluating the presence or absence of an electronic signature, one California Court of appeal case has stated  
 25 that a person must do more than "print their name" at the end of a document to render the electronic signature valid. *J.B.B*  
*Investments Partners, LTD v. Fair*, 232 Cal. App. 4<sup>th</sup> 974 (2014). The California Court of Appeal cited to the California  
 26 form jury instructions on this point, CACI No. 380, which provide that a "party suing to enforce an agreement formalized  
 27 by electronic means must prove based on the context and surrounding circumstances, including the conduct of the parties,  
 that the parties agreed to use [e.g., e-mail] to formalize their Form." The Court in *J.B.B Investments* also noticed the  
 28 absence of a separate contract authorizing an e-signature, which while not dispositive, was an important factor in finding  
 the e-signature invalid. There has been no demonstration by Defendants that any of the above has accomplished.

1       In a case we are involved in, Judge Gonzales Rogers denied a motion to compel for a similar  
 2 failure. Federal Rule of Evidence 1002 provides that “[a]n original writing is required in order to prove  
 3 its content unless these rules or a federal statute provide otherwise.” *See Rui Chen v. Premier Financial  
 4 Alliance, Inc.*, No. 18-CV-3771 (YGR), 2019 WL 280944, at \*1 n. 3 (N.D. Cal. Jan. 22, 2019) (finding  
 5 that declaration of defendant’s attorney describing online arbitration Form was precluded by the best  
 6 evidence rule and denying motion to compel arbitration under *Nguyen*).

7       The Skinner Decl. asserts, without any supporting evidence including the design of the page  
 8 surround such alleged click wrap, that “Customers manifest agreement by affirmatively clicking a  
 9 clickwrap box ***like the following***.” Skinner Decl. ¶ 14 (emphasis added). “Like the following” is not  
 10 sufficient evidence of what the site looks like to the consumer in order to determine if proper assent  
 11 has been given in accordance with *Nguyen*, and thus, Defendants have not established an agreement  
 12 to arbitration. The surrounding view of what is agreed to, and the page design was also required to be  
 13 included. Like the above authority, there is no factual evidence to suggest that the sign-up process  
 14 here includes constructive assent by patients to the terms and conditions purportedly embodied in the  
 15 Form. Mr. Navarro has never provided electronic assent to arbitration. Navarro Decl. ¶ 5. Moreover,  
 16 the only “terms and conditions” Mr. Navarro has in his possession, make no reference to any  
 17 arbitration provision. Navarro Decl., **Ex. 4**. Finally, as addressed above, such a formation question is  
 18 to be decided by the Court, and not the arbitrator.

19      **VII. THE PURPORTED ARBITRATION FORM FAILS FOR LACK OF COMPLIANCE**  
 20      **WITH CCP § 1295**

21       Defendants cite to other types of cases issued in other jurisdictions, where they have  
 22 successfully compelled arbitration of consumer claims. Those decisions have no applicability to the  
 23 present dispute. In California, an arbitration agreement is entirely unenforceable pertaining to claims  
 24 related to professional negligence of a health care provider without appropriate statutory notice.  
 25 Notably, California does not exclude claims like these from arbitration automatically with respect to  
 26 subsections (a) and (b) of 1295, but conditions the enforceability of such arbitration agreements on  
 27 reasonable consumer disclosures and protections. Plaintiff pled the lack of compliance with CCP §  
 28

1 1295 in the Compl. at ¶ 16. None of Defendants' attempts to avoid a clear application of CCP § 1295  
 2 have any merit.

3 **A. Defendants Do Not Dispute that the Arbitration Form does not comply with CCP §**  
 4 **1295**

5 It is beyond cavil that the purported arbitration Form does not comply with CCP § 1295.  
 6 *Rosenfield v. Superior Court* (1983) 143 Cal. App.3d 198, 200 (failure of a health care contract to  
 7 contain the advisements in subdivision (a) and (b) of section 1295 automatically renders unenforceable  
 8 the arbitration agreement)<sup>3</sup>; *Burks v. Kaiser Found. Health Plan, Inc.*, 160 Cal. App. 4th 1021 (Cal.  
 9 App. 3d Dist. 2008) (affirming a trial court finding that an arbitration provision contained in the one-  
 10 page Kaiser enrollment form was not “prominently displayed.”); cf. *Malek v. Blue Cross of California*,  
 11 121 Cal. App. 4<sup>th</sup> 44, 71-72 (Cal. Ct. App. 4<sup>th</sup> Dist. 2004) (“We therefore conclude that the penalty,  
 12 namely unenforceability for noncompliance with the arbitration disclosure requirements, is not  
 13 disproportionately harsh in relation to the gravity of the violation.”).

14 In order to be so insulated, the contract must contain prominent notice, in statutory language,  
 15 of the arbitration clause. Its purpose is to give people signing such Forms the forewarning that they  
 16 are relinquishing the right to a jury or court trial if a malpractice issue arises. (*Wheeler v. St. Joseph*  
 17 *Hospital* (1976) 63 Cal. App.3d 345, 361, fn. 11. That that end, subdivision (a) of section 1295 requires  
 18 an arbitration clause in the first article of a medical services contract and specifies the language to be  
 19 used. Subdivision (b) requires a statement in 10-point bold red type, again in specified language, to  
 20 be placed immediately before the signature line of the contract. (Stats. 1975, Second Ex. Sess. 1975-  
 21 1976, ch. 1, § 26.6, pp. 3975-3976.)

22  
 23  
 24

---

25 <sup>3</sup> When interpreting state law, district courts are bound by a decision from the highest state court. *In*  
 26 *re Kirkland*, 915 F.2d 1236, 1238 (9th Cir. 1990). In the absence of convincing evidence that the  
 27 highest court of the state would decide differently a federal court is obligated to follow the decision of  
 28 the state’s intermediate courts. *Id.* at 1239 (quoting *Am. Triticale, Inc. v. Nytco Servs., Inc.*, 664 F.2d  
 1136, 1143 (9th Cir. 1981)).

1       Here, the arbitration Form fails to comply with 1295(a) because it does not include any of the  
 2 language, in red, that *shall* appear in the arbitration Form.<sup>4</sup> This arbitration Form fails to comply with  
 3 1295(b) because it (a) does not include the language that *must* appear in the arbitration Form, and (b)  
 4 there is no such language immediately below the signature line. It also lacks red font type, and  
 5 specified language. *Rodriguez v. Superior Court*, 176 Cal. App. 4<sup>th</sup> 1461, 1470 (2009) (“No section  
 6 1295 Form exists unless each party signing the document consents, that is, acts voluntarily, is aware  
 7 of the nature of the document, has turned his or her attention to its provisions or reasonably should  
 8 have turned his or her attention to its provisions.”).

9       **B. The FAA Does Not Preempt CCP § 1295**

10      This Court has recognized that the Federal Arbitration Act does not preempt the application of  
 11 similar California notice requirements based on the McCarran-Ferguson Act (“McCarran”). *Cf.*  
 12 *Hunter v. Kaiser Foundation Health Plan*, 434 F. Supp. 3d 764, 772 (N.D. Cal. 2020) (“Courts have  
 13 consistently held that the Federal Arbitration Act (FAA) does not preempt Section 1363.1 because the  
 14 McCarran-Ferguson Act (15 U.S.C. § 1011 *et seq.*) preserves the ability of states like California to  
 15 regulate the insurance industry.”) *citing Brown v. Kaiser Found. Health Plan, Inc.*, No. E069356, 2019  
 16 WL 2539179, at \*4 (Cal. Ct. App. June 20, 2019) (the FAA does not preempt the related disclosure  
 17 requirements of CCP § 1363.1).

18      Defendants cite to an earlier and superseded decision of *Scott v. Yoho*, 248 Cal. App. 4<sup>th</sup> 392,  
 19 407 (Cal. Ct. App. 2016). *Yoho* is inapplicable to the facts of this case for several reasons. First, by  
 20 its own terms, the decision was one of “limited preemptive effect.” *Yoho*, *Id.* at 395 (“We conclude  
 21 the three arbitration Forms are subject to limited preemptive effect of the Federal Arbitration Act; the  
 22 30-day rescission right in Code of Civil Procedure section 1295, subdivision (c.”). This case does not  
 23  
 24

---

25      <sup>4</sup> See generally *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 434 n.9 (1995) shall generally means  
 26 must); Antonin Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal Texts* 114 (2012)  
 27 (observing that “when the word shall can be reasonably read as mandatory, it ought to be so read”);  
*Hunt Wesson Foods, Inc. v. Supreme Oil Co.*, 817 F.2d 75, 77-78 (9<sup>th</sup> Cir. 1987) (shall is a mandatory  
 28 term).

1 involve a right of rescission pursuant to subdivision (c).<sup>5</sup> More fundamentally, *Yoho* did not consider  
 2 the right of a litigant in Federal Court to assert reverse preemption under McCarran, thus negating  
 3 FAA preemption. Plaintiff asserts reverse preemption here.

4 McCarran imposes a “clear-statement rule” that “state laws enacted ‘for the purpose of  
 5 regulating the business of insurance’ do not yield to conflicting federal statutes unless a federal statute  
 6 specifically requires otherwise.” *United States Dep’t of Treasury v. Fabe*, 508 U.S. 491, 507-08  
 7 (1993). McCarran vests in the states’ regulation over “every person” engaged in the business of  
 8 insurance, and declares that “[n]o Act of Congress shall be construed to invalidate or impair” any such  
 9 state laws. 15 U.S.C. § 1012(b). As the Supreme Court has held, McCarran–Ferguson prohibits federal  
 10 preemption of state statutes regulating insurance and effectuates reverse preemption when the federal  
 11 law does not specifically relate to the business of insurance, the federal law would invalidate, impair  
 12 or supersede the state statute if applied, and the state statute was enacted for the purpose of regulating  
 13 insurance. *See Fabe*, 508 U.S. at 501, 113 S.Ct. 2202; *Humana Inc. v. Forsyth*, 525 U.S. 299, 307,  
 14 119 S.Ct. 710, 142 L.Ed.2d 753 (1999); *Ojo v. Farmers Grp., Inc.*, 600 F.3d 1205, 1208–09 (9th Cir.  
 15 2010). There is no dispute between the parties that the FAA would invalidate, impair, or supersede  
 16 CCP § 1295 if applied (particularly based on Defendants’ arguments in their Mot.), CCP § 1295 (and  
 17 related and companion statutes) were enacted for the purpose of regulating insurance, and finally, the  
 18 FAA does not specifically relate to the business of insurance.<sup>6</sup>

19 *Brown* has clarified the lack of preemption: “[t]he trial court is not required to harmonize  
 20 section 1363.1 with the FAA because the McCarran-Ferguson Act (15 U.S.C. § 1011 *et. seq.*) operates  
 21 to shield the statute from preemption. (*Imbler v. PacifiCare of Cal., Inc.* (2002) 103 Cal.App.4th 567,  
 22 571-573 (*Imbler*) [The purpose of the McCarran-Ferguson Act was to ‘insure that the states would

---

23  
 24 <sup>5</sup> *Yoho*, *Id.* at 404 (“The language, font, and color requirements specified in subdivisions (a) and (b) are present  
 25 in all three arbitration Forms executed by Ms. Parker.”). This is the opposite of the case here, where Defendants  
 have not complied with the language, font, or color requirements of (a) and (b).

26 <sup>6</sup> Unlike the FAA, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the  
 27 “Convention”) is not an “act of Congress” and thus, reverse preemption does not apply on those unique facts  
 concerning international arbitration (not applicable here). *CLMS Mgmt. Servs. Ltd. P’ship v. Amwins  
 Brokerage of Georgia, LLC*, 8 F.4th 1007 (9th Cir. 2021).

1 continue to enjoy broad authority in regulating the dealings between insurers and their  
 2 policyholders.’]; *Smith v. PacifiCare Behavioral Health of Cal., Inc.* (2001) 93 Cal.App.4th 139, 152-  
 3 162 [The FAA cannot preempt section 1363.1 because of the operation of the McCarran-Ferguson  
 4 Act, which was enacted so that the primary regulation of the insurance business would lie with the  
 5 states, not the federal government.].).”

6 *Third*, the finding in *Yoho* is not inconsistent with the arguments and holdings from other  
 7 decisions, that subsections (a) and (b) of § 1295 do not preclude claims from being brought in  
 8 arbitration outright. *Kindred Nursing Limited Partnership v. Clark*, 137 S. Ct. 1421, 1423 (2017)  
 9 (“[t]he FAA thus preempts any state rule discriminating on its face against arbitration—for example,  
 10 a ‘law prohibit[ing] outright the arbitration of a particular type of claim.’”). 1295(a) and 1295(b)  
 11 certain do not preclude a particular type of claim nor do they stand as any obstacle to implementation  
 12 of the FAA.

13 *Fourth*, the Federal Arbitration Act is not stated nor referenced anywhere in the Form, as is the  
 14 case in nearly all arbitration agreements. Instead, there is a California choice of law provision in the  
 15 document Mr. Navarro has presented. Navarro Decl., **Ex. 4**, Terms and Conditions, p. 2. *See Yoho*,  
 16 Id. at 403-404 (“[t]he agreements do not state that the arbitration agreements’ enforcement is governed  
 17 by California law.”). For all these reasons, CCP § 1295 is not preempted by the FAA.

18 **C. CCP § 1295 Applies to Defendants**

19 Defendants assert that they are not “health care providers.” Mot. 15. This argument, at  
 20 minimum, contemplates disputed questions of fact, and Defendants have not carried their summary  
 21 judgment like standard that they are not providing health care. Preliminary, Plaintiff has pled that  
 22 each Defendant is a “health care provider.” Comp. ¶ 17. Defendants do not rebut the assertion that  
 23 they are “clinics” or “health care providers” in the Skinner Decl., nor do they provide any evidence.  
 24 Instead, they argue *ipse dixit* that they “provide a telehealth platform through which licensed providers  
 25 interact with and provide clear aligner therapy to their patients and SDC’s customers” and this  
 26 somehow excuses them from being “health care providers.” Mot. 15. Defendants conveniently  
 27 ignore that co-defendant and conspirator Jeffrey Sulitzer was such a licensed provider who interacts  
 28

1 with, and provides, clear aligner therapy to Defendants' patients. Defendants also ignore the pled facts  
 2 that are to the contrary in the Complaint generally. Comp. ¶ 8-19.

3 The term "health care provider" is the exact definition used in the medical malpractice statute,  
 4 Code of Civil Procedure Section 340.5, and includes all professionals and their "legal representatives."  
 5 Based on Defendants' argument, a claim for malpractice dispute would never be available against the  
 6 Owner/Lessee of a hospital because the services are being provided under a different medical practice.  
 7 That is simply not the law. The term "Health care providers" has also been defined broadly under  
 8 340.5, to include injury that results from alleged negligence in the use and maintenance of equipment  
 9 needed to implement the doctor's order concerning medical treatment. *Flores v. Presbyterian*  
 10 *Intercommunity Hospital* (2016) 63 Cal.4th 75. Moreover, the Defendants describe plaintiff and all  
 11 other putative class members as "patients" in the very document they have presented to this Court,  
 12 including in the arbitration paragraph. (Dkt. 20-1, p. 9, p. 2) ("and include the names of the patient  
 13 and his/her attorney"); *see also* Terms and Conditions, Navarro Decl., Ex. 4 defining defendant as the  
 14 "provider"). Third, Defendants argue that they are not engaged in the "practice of dentistry," pursuant  
 15 to section 1295; that is the opposite of what the Complaint and the accusation by the California Dental  
 16 Board, allege. *Covenant Care, Inc. v. Super. Ct.* (2004) 32 Cal.4th 771, 785 ("the legislative history  
 17 of section 425.13 demonstrates that the Legislature's intent in enacting the statute was to protect health  
 18 care providers (or practitioners) only in their professional capacity as providers; there was no intent to  
 19 protect them in any other capacity."). In short, Defendants have not met their burden of establishing  
 20 that they are not service providers for the purpose of CCP § 1295.

#### 21 **D. CCP § 1295 is not a safe harbor provision**

22 Defendants suggest that § 1295 has no teeth, and it should be read as a non-binding advisory  
 23 statute. They ignore the commands of the two subsections they have admittedly violated, each  
 24 commanding mandatory behavior. Defendants neglect that all California decisions have concluded  
 25 that a failure to comply with (a) and (b) renders the entire agreement null in formation and  
 26 unenforceable. *See e.g. Rosenfield v. Superior Court* (1983) 143 Cal. App.3d 198, 200 (failure of a  
 27 health care contract to contain the advisements in subdivision (a) and (b) of section 1295 automatically  
 28 renders unenforceable the arbitration Form); *Rodriguez v. Superior Court*, 176 Cal. App. 4<sup>th</sup> 1461,

1 1470 (2009) (“No section 1295 Form exists unless each party signing the document consents, that is,  
 2 acts voluntarily, is aware of the nature of the document, has turned his or her attention to its provisions  
 3 or reasonably should have turned his or her attention to its provisions.”)

4 Defendants grossly misread the holding in *Dinong v. Superior Court*, 102 Cal. App. 3d 845,  
 5 849 (Cal. Ct. App. 1980). *Dinong* suggests that a defendant who complies with the subsections of  
 6 1295, is insulated pursuant to subsection (c). Here, there is no question Defendants did not comply.  
 7 “In order to be so insulated, the contract must contain prominent notice in statutory language, of the  
 8 arbitration clause.” *Id.* at 849. Defendants do not dispute that the Form fails to include prominent  
 9 notice in statutory language of the arbitration clause. Defendants’ argument that “shall” and “must”  
 10 in subsections (a) and (b), be rendered nugatory and permissive in this context, is an absurd  
 11 interpretation of a California statute that cannot be countenanced and is not supported by a single case.  
 12 Defendants’ argument is also an improper disavowal of unanimous authority finding that the failure  
 13 to comply with these mandatory provisions, renders the arbitration Form entirely unenforceable.

14 **VIII. THE PURPORTED ARBITRATION FORM FAILS UNDER THE MCGILL RULE**

15 The Court should retain jurisdiction over and proceed to allow litigation over all causes of  
 16 action, because Plaintiff seeks “public injunctive relief” by way of restitution and forward-looking  
 17 changes in practices that would benefit the public. *McGill v. Citibank, N.A.*, 2 Cal. 5th 945 (Cal.  
 18 2017). Here, Plaintiff has pled the right to public injunctive relief. *See e.g.*, Compl. ¶ 19.

19 In *McGill*, the California Supreme Court held that an arbitration Form precluding a consumer  
 20 from seeking injunctive relief otherwise authorized by California’s consumer protection statutes in  
 21 any forum was “invalid and unenforceable under state law insofar as it purports to waive *McGill*’s  
 22 statutory right to seek such relief.” *McGill*, 2 Cal. 5th at 961; *see also Blair v. Rent-A-Ctr., Inc.*, 928  
 23 F.3d 819 (9th Cir. 2019) (affirming that the FAA did not preempt the *McGill* rule and finding district  
 24 court did not err by refusing to stay non-arbitrable claims). Defendants impermissibly cite to *Ferguson*  
 25 *v. Corinthian Colleges, Inc.*, 733 F.3d 928, 930 (9<sup>th</sup> Cir. 2013) for the premise that FAA preempts  
 26 *McGill*, Mot. p. 7, but that case and the others cited by Defendants, were superseded by *Blair* in 2019.  
 27 Thus, *Ferguson* is no longer valid authority for that proposition.

1       The *McGill* Court explained that “public injunctive relief under the UCL, the CLRA, and the  
 2 false advertising law is relief that has ‘the primary purpose and effect of’ prohibiting unlawful acts  
 3 that threaten future injury to the general public.’ . . . Relief that has the primary purpose or effect of  
 4 redressing or preventing injury to an individual plaintiff—or to a group of individuals similarly  
 5 situated to the plaintiff—does not constitute public injunctive relief.” *McGill*, 2 Cal. 5th at 955  
 6 (internal citations omitted).

7       First, the Form does in fact preclude injunctive relief. “The Demand for Arbitration **must** be  
 8 in writing to all parties, identify each defendant, describe the claim against each party, state the **amount**  
 9 **of damages sought**, and include the names of the patient and his/her attorney.” Form, Dkt. 20-1, p. 9  
 10 (emphasis added). By allowing only “damages sought” to be joined to the demand in arbitration, this  
 11 implies the exclusion of being entitled to any other form of relief including public injunctive relief.

12       Second, it is not apparent that even if public injunctive relief was not precluded in arbitration,  
 13 that such public injunctive relief could be obtained based on the contract and rules of AAA. R-47 of  
 14 the AAA requires any such remedy to be “within the scope of the agreement of the parties.” AAA R-  
 15 47. Here, the public injunctive relief is not within the scope of the purported Form and is in fact  
 16 expressly or impliedly excluded as to Plaintiff. Second, the AAA rules only permit injunctive relief  
 17 to be awarded on an “interim” basis. AAA R-37 (“The arbitrator may take whatever interim measures  
 18 he or she deems necessary, including injunctive relief and measures for the protection or conservation  
 19 of property...”).<sup>7</sup> The remedy Plaintiff has sought in the prayer of his Complaint is permanent and  
 20 final injunctive relief. If the remedy is unavailable in arbitration because it is not allowed to be brought  
 21 in arbitration or it would be practically unavailable, the public injunctive relief must proceed in Court.  
 22 As the Supreme Court has held, arbitration cannot frustrate the vindication of state or federal rights.  
 23 *Am Express Co. v. Italian Colors Rest.*, 470 U.S. 228, 236 (2013). Without clarification on this point  
 24 of law, arbitration could stand to do just that.

25  
 26  
 27       <sup>7</sup> Although, we are aware of some authority indicating public injunctive relief may be available in  
 28 arbitration, *Ionescu v. Extra Space Storage Inc.*, 19-CV-02226-YGR, 2019 WL 3997480, at \*4 (N.D.  
 Cal. Aug. 23, 2019), no award has been confirmed granting such relief that we have seen, nor has  
 decision analyzed whether the AAA rules even permit public injunctive relief on a final basis.

1       IX. **THE FORM IS UNCONSCIONABLE**

2           Preliminarily, this case involves matters related to “performance” which is regulated by the  
 3 law prevailing at the “place of performance.” *Scudder v. Union Nat. Bank of Chicago*, 91 U.S. 406  
 4 (1875). In California, a contract is likewise governed by the law and usage of the place where it is to  
 5 be performed. *Front. Oil Corp. v. RLI Ins. Co.*, 2007 Cal. App. LEXIS 1298 (2d Dist. August 6, 2007)  
 6 (nature of the contract and the location of the services to be provided); *Henderson v. Super. Ct.*, 142  
 7 Cal. Rptr. 478 (Cal. Ct. App. 1978); *Great Nor. Ry. Co. v. Sup. Ct.* (1970) 12 Cal.App.3d 105, 113.  
 8 Thus, and in addition to the California choice of law provision, Navarro Decl., **Ex. 4**, California law  
 9 applies.

10           A. **The Form is Procedurally Unconscionable**

11           Procedural and substantive unconscionability operate on a sliding scale; the more questionable  
 12 the meaningfulness of choice, the less imbalance in a contract’s terms should be tolerated and vice  
 13 versa. *Bridges Fund v. Fastbucks Franchise Corp.*, 622 F.3d 996, 1004 (9<sup>th</sup> Cir. 2010). The  
 14 contradictory, difficult to understand, and pre-printed Form drafted by SDC, which are not part of a  
 15 separate document providing for arbitration, is at minimum, procedurally unconscionable. *Ali v. J.P.*  
 16 *Morgan Chase Bank, N.A.*, No. 14-15076, 2016 WL 1380922, at \*1 (9<sup>th</sup> Cir. Apr. 7, 2016) (“[a]dhesive  
 17 contracts are at least minimally procedurally unconscionable under California law.”); *Fardig v. Hobby*  
 18 *Lobby Stores, Inc.*, 2014 U.S. Dist. LEXIS 87284, at \*10 (C.D. Cal. June 13, 2014).

19           Additionally, Defendants’ failure to provide a physical copy of the AAA rules or AAA  
 20 policies, further supports a finding of procedural unconscionability. *Pokorny v. Quixtar, Inc.* 601 F.3d  
 21 1987, 1004 (9th Cir. 2010); *Aviles v. Quick Pick Express, LLC*, Case No. CV-15-5214-MWF, 2015  
 22 WL 9810998, at \*7 (C.D. Cal. Dec. 3, 2015); *Attia v. Neiman Marcus Group*, Case No. 8:16-cv-  
 23 00504-DOC (FFM), \*12 (C.D. Cal. June 27, 2016). Defendants have not provided the AAA rules,  
 24 nor have they produced any evidence of electronic assent by the class members or Plaintiff. A stray  
 25 reference in the declaration does not appear to reflect source code of any electronic transmission.  
 26 Finally, there is a disparity in bargaining power between a patient and an operator, which further  
 27 informs the fact that the Form is procedural unconscionability. *Quixtar, Id.* at 996. The Form, is thus,  
 28 procedurally unconscionable.

1                   **B. The Form is Substantively Unconscionable**

2                   Substantive unconscionability concerns how one-sided a bargain is. *Armendariz v. Foundation*  
 3 *Health Psychcare Services, Inc.*, 6 P.3d 669, 693 (Cal. 2000). An arbitration clause that lacks  
 4 mutuality without a reasonable justification is sufficient to find unconscionability. *Id.* at 117-18. There  
 5 are three components that independently render Defendants' arbitration policy substantively  
 6 unconscionable: the non-mutual right of Defendants to litigate in Court, the lack of any suggestion of  
 7 an actual agreement and vagueness, and the cost and expense of arbitration exceed the potential that  
 8 can be gained if the arbitration were to proceed on an individual basis.

9                   1. Requiring one party to arbitrate, but not the other is unconscionable.

10                  Requiring one party to arbitrate its claims, but not the other, is a paradigmatic form of  
  11 substantive unconscionability under California law. *See Little v. Auto Stiegler, Inc.*, 63 P.3d 979, 984  
  12 (Cal. 2003); *Armendariz v. Foundation Health Psychcare Services*, *Id.* at 693. The arbitration  
  13 provision in the Form only applies to the Plaintiff patient, and not the Defendants. Form, pp. 8-9 ("I  
  14 hereby agree that any dispute...") This alone, renders the Form substantively unconscionable.

15                  2. The Form Does Not Even Suggest any Agreement until Page 8

16                  The Form does not imply an agreement, it is not labeled an agreement, and the only reference  
  17 to the term "agree" or "contract" is at page 8. The Form is entitled "How Does the SmileDirectClub  
  18 Aligner Therapy System Work?" Dkt. No. 20-1. Not until page eight of the single space document  
  19 is there any suggestion of any Form or contract. "AGREEMENT TO ARBITRATE." Because there  
  20 is no suggestion of any agreement to do anything on the first page, as is the case with the contract of  
  21 nearly every legitimate company, the Form is misleading and unfair.

22                  3. The Expense of Arbitration Dwarfs Plaintiff's Individual Claims

23                  Where the cost of a neutral dwarfs available recovery, the policy is unconscionable. *Chavarria*  
  24 *v. Ralph's Grocery Store Company*, 733.F3d 916 (9<sup>th</sup> Cir. 2013). Even if Plaintiff were assessed only  
  25 one-half of the total fee, the Plaintiff's share would still be far more than the \$350 filing fee of this  
  26 Court. 28 U.S.C. § 1914. *See, e.g., Comb v. PayPal*, 218 F. Supp. 2d 1165 (N.D. Ca. 2002) (estimated  
  27 \$5000 arbitral fee held excessive); *Ting*, 319 F.3d at 1151 (approving a Tenth Circuit decision "holding  
  28 unenforceable a fee-splitting provision that would cost an employee between \$1875 and \$5000 to

1 resolve a particular claim"). The costs that Plaintiff would be required to pay to participate in  
 2 Defendants' arbitration process would prejudice Plaintiff from bringing his action. Thus, the cost-  
 3 sharing provisions are unconscionable and unenforceable. Further, the expense of arbitration would  
 4 dwarf the Plaintiff's individual claims. Because the arbitration clause interferes with cost shifting  
 5 rights, and would dwarf the total individual claims at issue in this litigation, the arbitration provision  
 6 is unconscionable.

### 7 C. The Unconscionable Terms Should Not Be Severed

8 The entire contract is "wholly unenforceable" if the Court detects an "insidious pattern" that  
 9 "functions as a thumb on [defendant's] side of the scale" if a dispute arises. *Ingle v. Circuit City Stores*,  
 10 328 F.3d 1165, 1180 (9th Cir. 2003). In *Quixtar*, the 9<sup>th</sup> Circuit held that the District Court enjoys  
 11 broad discretion to determine that an arbitration agreement should not be enforced *in its entirety*.  
 12 *Quixtar*, *Id.* at 1003; *see generally Poublon v. C.H. Robinson Co.*, 846 F.3d 1251, 1272 (9th Cir. 2017);  
 13 Cal. Civ. Code § 1670.5(a); *see also Perez v. DIRECTV Group Holdings, L.L.C.*, No. 8:16-cv-1440–  
 14 JLS–DFMx, 2017 WL 1836357 (C.D. May 1, 2017).

15 Saving an arbitration clause by severing each individual problematic provision would allow a  
 16 company to draft a one-sided agreement and then whittle down to the least-offensive agreement when  
 17 faced with litigation, rather than drafting fair agreements in the first instance. Thus, a court may refuse  
 18 to enforce an arbitration agreement that is "so permeated with unconscionable clauses that we cannot  
 19 remove the unconscionable taint from the Form." *Ferguson v. Countrywide Credit Industries, Inc.*,  
 20 298 F.3d 778, 788 (9th Cir. 2002); *Bridges Fund v. Fastbucks Franchise Corp.*, 622 F.3d 996, 1006  
 21 (9<sup>th</sup> Cir. 2010); *Armendariz*, 24 Cal. 4th at 124; *Nagrampa v. MailCoups, Inc.*, 469 F.3d 1257, 1293  
 22 (9th Cir. 2006).

23 Here it is plain that the entire Defendants' Terms, with nothing suggesting any agreement until  
 24 page eight, involve a systematic effort to impose an inferior forum on Plaintiff and other similarly  
 25 situated patients. The list of multiple defects goes on and on: bias, lack of mutuality, vagueness,  
 26 excessive fees, potential other agreements not including an arbitration provision. If the Court is not  
 27 satisfied that all of this is so, Plaintiff requests an opportunity for limited discovery on the facts relevant  
 28

1 to arbitrability before Defendants' motion is decided. *Blair v. Scott Specialty Gases*, 283 F.3d 595,  
 2 609 (3d. Cir. 2002).

3 **EVIDENTIARY OBJECTIONS**

4 Pursuant to Civil L.R. 7-3(a), Plaintiff submits his evidentiary objections to the Declaration  
 5 of Justin Skinner [Dkt. No. 20] ("Skinner Decl.").

6 Plaintiffs object to the conclusory allegations in the Skinner Decl. that class member and  
 7 Plaintiff's purported assent to the Form, specifically, "Customers manifest agreement by affirmatively  
 8 clicking a clickwrap box like the following..." Skinner Decl., ¶14. Plaintiff objects that this evidence  
 9 does not comply with *Nguyen v. Barnes & Noble, Inc.*, 76 F.3d 1171, 1173 (9<sup>th</sup> Cir. 2014) by failing  
 10 to include the actual design and appearance of the website, and should be disregarded and not  
 11 considered based on (1) the best evidence rule, (2) the rule of completeness, (3) the rule of adverse  
 12 interest, and (4) hearsay.

13 The "best evidence rule" applies under FRE 2001 where secondary evidence is offered to prove  
 14 the content of a writing. A witness' reporting of evidence from a writing is inadmissible under the  
 15 best evidence rule. *Los Angeles News Service v. CBS Broadcasting, Inc.*, 305 F.3d 924, 935-36 (9<sup>th</sup>  
 16 Cir. 2002); *see also Railroad Management Co., L.L.C. v. CFS Louisiana Midstream Co.*, 428 F.3d  
 17 214, 219, fn. 2 (5<sup>th</sup> Cir. 2005) (when the writing is central to the case, oral testimony cannot be  
 18 substituted for writing). The adverse interest rule applies where a party has failed to produce relevant  
 19 evidence within his or her control, and such failure to produce dictates an adverse ruling. *Interstate  
 20 Circuit, Inc. v. United States* 306 U.S. 208, 226 (1939). The Rule of Completeness under FRE 106  
 21 allows an adverse party to require the introduction of any other part of the writings in the interest of  
 22 fairness. *Dugan v. R.J. Corman R.R. Co.*, 344 F.3d 662, 669 (7<sup>th</sup> Cir. 2003).

23 Here, the basis by which class members enrolled is essential to the disposition of the Motion to  
 24 compel arbitration, and in fact essential under controlling authority. Defendants have offered certain  
 25 suggestions about what a customer may agree to through a cropped and enlarged click box portion of  
 26 the screen, but none of the documents or images embedded in the Declaration reflect assent or an  
 27 electronic signature in accordance with *Nguyen*, and the design of the site that consumers see was not  
 28 included. Mr. Skinner's statements are insufficient under the Federal Rules of Evidence, and

1 constitute an out of court statement offered to prove the truth of the matter asserted – that patients  
 2 provided electronic assent and were constructively put on notice of the Form. Skinner's statements  
 3 to this effect, should be disregarded. For the same reasons, and based on lack of foundation, and  
 4 hearsay, we object to ¶¶20-27 of the Skinner Decl.

5 **XI. CONCLUSION**

6 The Motion should be denied. Alternatively, Plaintiff requests that the Court set a Jury Trial  
 7 on any triable fact, and a reasonable opportunity for discovery. 9 U.S.C. § 4; *see also Sanford v.*  
*8 MemberWorks, Inc.*, 483 F.3d 956, 962 (9th Cir. 2007) (“[W]hen one party disputes ‘the making of  
 9 the arbitration Form,’ the Federal Arbitration Act requires that ‘the court [ ] proceed summarily to the  
 10 trial thereof’ before compelling arbitration under the Form.”) (brackets in original); *GIB, LLC v. Salon*  
*11 Ware, Inc.*, 634 F. App’x 610, 611 (9th Cir. 2016); *Barraza v. Cricket Wireless LLC*, No. C 15-02471  
*12 WHA*, 2015 WL 6689396, at \*6 (N.D. Cal. Nov. 3, 2015).

14 Dated: February 22, 2022

Respectfully submitted,

16 /s/ Blake J. Lindemann

17 Blake J. Lindemann  
 18 California Bar No. 255747  
 19 E-mail: blake@lawbl.com  
 20 Donna R. Dishbak  
 21 California Bar No. 259311  
 22 E-mail: donna@lawbl.com  
**LINDEMANN LAW FIRM, APC**  
 23 433 N. Camden Drive, 4<sup>th</sup> Floor  
 24 Beverly Hills, CA 90210  
 25 Telephone No: 310-279-5269  
 26 Facsimile No: 310-300-0267

27  
 28 *Attorneys for Plaintiff and the Proposed Classes*

**CERTIFICATE OF SERVICE**

I hereby certify that on February 22, 2022, I electronically filed the foregoing document using the CM/ECF system, which will send notification of such filing to all counsel of record registered in the CM/ECF system.

/s/ Blake J. Lindemann